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No. 88-1902

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LOCAL LODGE D504, D17, D54, D376, D547 and D554 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; GARY MAROSITZ, RICHARD GROSS, JAMES BEGIES, GEORGE MAYER, ALEXANDER SZOKE, RUEL OSWALD, ROBERT VOGEL, JEFFREY FENSTERMACHER, WILFRED BRUMBAUGH, NORMAN HOOVER, ROBERT BURK, RICHARD YELLES, WAINWRIGHT BEAL, RONALD SILFIES, BARRY SILFIES, ROBERT CSENCITZ
and
INDEPENDENT WORKERS OF NORTH AMERICA,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CHARLES JONES, DONALD WHAN AND HENRY HARDEN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATUTORY PROVISIONS

In addition to the statutory provisions set forth in the Petition for Writ of Certiorari, this case involves the following statutory provisions.

29 U.S.C. § 185:

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent – Entity for purposes of suit – Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and on behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principle office, or (2) in any district court in which its duly authorized officers or

agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 411(a)(2):

§411. Bill of rights; constitution and bylaws of labor organizations.

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Boilermakers or IBB) is an unincorporated labor organization within the meaning of Section 2(5) of the National Labor Relations Act. (A-5) Currently the Boilermakers is

an International Union having approximately 100,000 members in the United States and Canada. These members belong to some 680 local lodges all of which are parties to the Constitution of the International Brotherhood of Boilermakers. At the International level the Boilermakers maintain a variety of divisions, which facilitate collective bargaining in their respective industries, e.g., the Cement Division, the Railroad Division, the Shipbuilding Division and the Construction Division. Each local lodge is chartered by the International Union and is required to adopt a uniform set of bylaws that acknowledge the International Constitution as the governing instrument for all the Boilermakers' subordinate local lodges.

In 1983 the Boilermakers began discussions with the Cement, Lime, Gypsum and Allied Workers International Union (Cement Union) relating to the Merger of the two organizations. (A-6) There were approximately 25,000 members in the Cement Union at that time.

There were striking similarities in the two unions' Constitutions with regard to ownership of union property; especially at the local level. Article XXXVI Section 2 of the Boilermakers Constitution provided:

> Section 2. the funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to such subordinate body shall be forwarded promptly to the International Secretary Treasurer and all real estate and other property owned or held by such body shall be immediately transferred and conveyed by the proper legal instrument to the

International Board of Trustees of the International Brotherhood.

* * *

Similarly Article 15, Section 8 of the Cement Union's Constitution provided:

> Section 8. ***International Union Control Over Local Union Property***
>
> In cases of suspension, revocation of the charter, expulsion, lapsing, or disbanding of any local union for any cause or reason whatsoever, all the funds, property and assets of the local union shall forthwith revert to and become the property and assets of the International Union. The International Secretary Treasurer may authorize, in writing, a member of a nearby local union or another representative to take charge of and to remit to the International Union all of said funds, property and assets of the said local union. *** In the event that such local union is not reestablished, all funds, property and assets shall belong to and become the property of the International Union to be coming led with the other property of the International Union.

Indeed, the Cement Union's Constitution went so far as to provide:

> Article 11, Section 3 **Property Rights**
> Membership in this International Union shall not vest any member with any right, title or interest in or to the funds, property or other assets of this International Union or any subordinate body, whether now owned or possessed or whether hereafter acquired, and each member hereby expressly waives any right, title or interest in or to the funds, property or other assets of this International Union or any subordinate body.

In addition to these clauses that defined what would happen to local union property upon the disbandment of a local, the two Constitutions contained similar clauses that permitted the International union to disband a local. The Cement Union Constitution provided, *inter alia,:*

> Article 15, Section 7 **Disbanding of Local Unions.** So long as seven (7) members thereof remain in good standing and retain employee status in a bargaining union which constitutes the sole jurisdiction of the local union, a local union cannot be disbanded nor can such local union vote or otherwise decide to disband. ***

Article V, Section 6 of the Boilermakers' Constitution provides, *inter alia,:*

* * *

> Any local lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds and assets (including trust, trust funds or other trust properties, held, operated or controlled by such local lodge) owned or held by such local lodge at the time of such disbanding, which shall become the property of the International Brotherhood.

The IBB and the Cement Union followed the same practice of demanding the return of all local union assets upon the disbanding of a local union affiliate. (A-7, n.7)

The document that would be executed as the final Merger Agreement was presented to a special convention of the Cement Workers on March 14-15, 1984 called for the purpose of ratifying the proposed Merger. The Merger Agreement was organized to track the provisions of the Boilermakers International Constitution. So, for instance, the creation of a new International Vice President-At-Large was indexed under Article IV

Section 1 of the Boilermakers Constitution, while vacancies in that office were indexed under Article IV Section 5 of the Constitution. (A-10)

The Merger Agreement's first phrase states:

> The Constitution of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers will be the supreme law of the merged organization. (A-9)

Indexed under Article V, Section 3 of the Boilermakers Constitution the Merger Agreement provided:

> Article V, Section 3
> **Jurisdiction of District and Local Lodges**
> Local Union charters held by the current Local Unions in the United Cement, Lime, Gypsum and Allied Workers International Union will have issued in their stead Boilermaker Charters carrying the present local numbers preceded by a capital "D". Each Local Lodge will retain its Local Union treasury.
>
> As soon as possible following effective date of Merger but not to exceed six (6) months, the present districts will be formed into the Cement, Lime, Gypsum and Allied Workers Division. (A-9, 10)

All other assets of the Cement Workers and its district councils of every kind and description were to be turned over to and placed into the General Fund of the International Brotherhood of Boilermakers. (A-10) The Merger Agreement made no mention of, nor did it make changes to, Article V, Section 6 or Article XXXV of the Boilermakers Constitution. Those provisions which dealt with the disbanding of local lodges and the title to the funds and assets of the Boilermakers were left untouched. Post merger the Boilermakers continued to enforce the surrender clauses of their Constitution

where local cement division lodges fell below ten (10) members. (A-7, n.7)

On August 11, 1986 the Boilermakers held their Twenty-Seventh Consolidated Convention. Henry Bechtholdt, Cement Division Director, had become a candidate for International Vice President-At-Large in opposition to the incumbent Richard Northrip. The Merger itself had become an issue at the convention as a result of the Boilermakers' Executive council's resolution to dissolve the Merger; a procedure that was set forth in the Merger Agreement itself. This resolution became the first order of business and was defeated by a vote of the delegates on the floor of the convention. The next order of business was the election of International officers in accordance with Article IV, Section 4 of the Boilermakers' Constitution. The delegates to the Convention elected Henry Bechtholdt to succeed Northrip as the International Vice President-At-Large. In the same election Thomas Cooper, who had decided to abandon his area vice presidency and run for the office of International Secretary-Treasurer, was defeated. (A-6)

Together Cooper and Northrip left the Boilermakers and started a rival International Union, the Independent Workers of North America (IWNA). They were joined by former Boilermaker employees, many of whom had been officers of the now defunct United Cement, Lime, Gypsum and Allied Workers International Union.

In October, 1986, the IWNA met with the officers of Local Lodges D504, D17, D54, D376, D547 and D554 (Local Lodges) and explained to them a procedure developed by the IWNA designed to result in the decertification of the Boilermakers and the certification of the IWNA by these employees. The Boilermaker Constitution expressly prohibits the cessation or disaffiliation of a Local Lodge. (A-10, n.8) It does not, however, prohibit a member or a group of members from leaving the organization. This the members chose not to do. The members of these local lodges were not content to merely

quit, they wanted to transfer the local lodge, as an entity, with its assets in tact, to the IWNA. The procedure set out by the IWNA called for each of the local lodges to conduct an internal union vote to "disaffiliate" from the Boilermakers. Boilermakers International representatives were neither notified of the meetings nor were they invited to attend. The procedure called for the officers of these local lodges to obtain signatures on "disaffiliation" petitions and for an internal union vote on the question of "disaffiliation." The local Lodge members were told that their signatures on new union authorization cards would be used to obtain an election with the NLRB. No Boilermakers representatives were permitted to attend these secret votes and in most cases only small numbers of union members cast their vote in favor of disaffiliation. Although those that attended voted in favor of the disaffiliation, these members were not told that secession or disaffiliation votes were in express violation of the existing Boilermakers Constitution. (A-27) These local lodges were then advised to transfer their assets out of the local lodge and into the bank accounts of a new entity, the IWNA local union. Two of the local lodges, D554 and D547, then made per capita tax payments to the IWNA although the IWNA did not as yet have any constitution or bylaws calling for such payments. These lodges continued to collect dues from their members, but as a result of these manipulations, these local lodges withheld their per capita tax payments to the Boilermakers which the appellants and appellees were able to stipulate came to $39,730.

The District Court found specifically that internal union votes to disaffiliate were ineffective to accomplish that purpose. (A-16, 27) Further, the District Court found, that even after these internal disaffiliation votes were taken, the local lodges and their members continued to accept support services from the IBB. These findings were not disturbed by the Court of Appeals. (A-16, 27)

Between November 4, 1986 and February 9, 1987 the IWNA filed six (6) petitions with the National Labor Relations Board seeking elections for the certification of a new bargaining representative at six employer locations where a Boilermakers' local lodge was the currently certified bargaining representative. (A-7, n.5) Each petition acknowledged that a Boilermakers' local lodge was the currently certified or recognized collective bargaining representative of the employees in question and each was signed by an employee of the IWNA. In each case an election was conducted by the National Labor Relations Board and the Independent Workers of North America was certified as the new bargaining representative of the employees ousting the Boilermakers at those employer locations.

Under the International Brotherhood of Boilermakers' constitution, these NLRB elections effectively reduced the membership of the six local lodges to zero. The Boilermakers' then notified the officers of each of the locals that they were disbanded in accordance with the provisions of Article V, Section 6 of the International Constitution. Although requested to turn over all of the books, records, properties, funds and assets of the local Lodge to the International Union each local failed and refused to do so. (A-7)

REASONS WHY THE WRIT FOR CERTIORARI SHOULD NOT BE GRANTED

1. Certiorari Should Not Be Granted Because The Decision Below Does Not Create A Conflict Among The Circuits.

The decision in the present case is in accord with the Eleventh Circuit decisions in *International Brotherhood of Boilermakers v. Local Lodge D111,* 858 F.2d 1559 (11th Cir. 1988), *cert. denied,* ____ U.S.____, May 1, 1989 and *International Brotherhood of Boilermakers v. Local Lodge D238,* 865 F.2d 1228 (11th Cir.

1989) and is not in conflict with the decision of the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687 (7th Cir. 1988).

On May 1, 1989, this Court denied a Petition for Writ of Certiorari in *International Brotherhood of Boilermakers, Local Lodge D111, supra.* There the petitioner made the identical claim that they are making herein, i.e. that there is a conflict in the circuits. The case *sub judice* was cited by the petitioner in the D111 case as a basis for its so-called conflict. No additional circuit court decisions, indeed no district court decisions have been decided in the interim that conflict with the present case.

In *International Brotherhood of Boilermakers v. Local Lodge 714, supra,* the IBB sought to enforce the trusteeship provisions of the Boilermakers' Constitution. The IBB argued that local lodge 714 and its officers had violated the Constitution and that the IBB was entitled to injunctive relief to enforce the trusteeship placed on local lodge 714. The Seventh Circuit determined that if there were no longer ten (10) active members in local lodge 714 then the local lodge was automatically disbanded, and thus, there was no local lodge for the IBB to trustee. The Seventh Circuit also stated:

> The international's constitution may forbid disaffiliation, as we have seen. If so, then even if the prohibition is not enforceable by means of the trusteeship, because the prohibition of secession as such may not be a legitimate objective under section 302, it may still be enforceable as a matter of contract law.
>
> * * *
>
> The international union may appear to have a clear right to the return of its books and money, but that is not correct, because if the trusteeship is valid the

> trustee has the right to the books and money, while if the trusteeship is invalid the books and money presumably should be turned over to the international.
>
> * * *
>
> [P]rovided Local Lodge 714 did not disband before the trusteeship was voted and by disbanding perhaps place itself beyond the power of the international to impose a trusteeship; on these questions a remand is necessary.

845 F.2d at 695. Thus, the Seventh Circuit did not resolve two (2) questions: (1) Did Local Lodge 714 fall below ten (10) members and thus automatically disband, and (2) Does the IBB constitution prohibit a local lodge from "disaffiliating"?

In the present case the IBB sought enforcement of the contractual surrender clause set forth in the IBB constitution, referred to by the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687.[1] The IBB argued that the member-

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1. The constitution of the IBB provides in relevant part:

> Upon issuance of such Charter, such Local Lodge shall, subject to other applicable provisions of this Constitution and particularly Section 3 and 4 of this Article, continue in existence while ten (10) or more of its members are employed under the jurisdiction of the International Brotherhood, subject to the approval of the Executive Council. If ten (10) or more members maintain membership in such Local Lodge and otherwise comply with the provisions of this Constitution, all books, records, properties, funds and assets (including trusts, trust funds, or other trust properties held, operated or controlled by such Local Lodge) owned or held by such Local Lodge shall remain the property of such Local Lodge so long as the Charter is maintained.
>
> Any Local Lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds and assets (including trusts, trust funds or other trust properties held, operated or controlled by such Local

ship in the Local Lodges fell below ten (10) members as the result of an NLRB election. The IBB further argued that the IBB constitution contractually obligated the Local Lodges to surrender all books, records, property, funds and assets of the local; the locals having been disbanded pursuant to the IBB constitution. Citing the 11th Circuit decision in *International Brotherhood of Boilermakers v. Local Lodge D111,* 858 F.2d 1159, as support, the Third Circuit found this contractual surrender clause enforceable. *International Brotherhood of Boilermakers v. Local Lodge D504,* 866 F.2d 641 (3d Cir. 1989).

Neither the Third Circuit nor the Eleventh Circuit, addressed the issue before the Seventh Circuit – enforceability of a trusteeship. All three (3) circuits are in

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Lodge) owned or held by such Local Lodge at the time of such disbanding, which shall become the property of the International Brotherhood (Article V, Section 6).

The funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to each subordinate body shall be forwarded promptly to the International Secretary-Treasurer and all real estate and other property owned or held by such body shall be immediately transferred and conveyed by the proper legal instrument to the International Board of Trustees of the International Brotherhood. The International Brotherhood through its Board of Trustees shall be authorized to sell and liquidate such real estate and other property and the proceeds arising therefrom, after the payment of expenses incurred, shall be deposited with the other funds so forwarded to the International Secretary-Treasurer. All such funds shall revert to the General Fund of the International Brotherhood with the proper record of the transfer maintained by the International Secretary-Treasurer. In the event such subordinate body should ever be rechartered at that location, the Executive Council is authorized to give approval to the transfer of an amount not to exceed fifty per cent (50%) of such funds from the General Fund to the credit of the rechartered subordinate body. (Article XXXVI, Section 2).

accord on the only common issue – the enforceability of the surrender clauses contained in the IBB's constitution.

Apparently, Petitioners hinge their argument that there is a conflict among the circuits on certain language in *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687, the Seventh Circuit stated:

> [t]he international constitution is ambiguous on the right to disaffiliate. It contains no provision authorizing disaffiliation and contains a provision making 'secession or threatened secession' a ground for imposing a trusteeship, which could be taken either as an implied prohibition of disaffiliation or as recognition that disaffiliation will sometimes occur and authorization to do something about it.
>
> * * *
>
> Maybe Local Lodge 714 could not disaffiliate but if so many of its members quit and fewer than ten remained the lodge was automatically disbanded and its property reverted to the international.

845 F.2d at 692. The Seventh Circuit went on to conclude that because of the state of the record it could not make a determination as to whether or not the IBB constitution prohibited disaffiliation.

In *International Brotherhood of Boilermakers v. Local Lodge D111, supra,* the Eleventh Circuit did not squarely rule on whether or not the IBB constitution prohibited disaffiliation of a local lodge. The Eleventh Circuit found that Local Lodge D111 fell below ten (10) members and was disbanded as the result of an NLRB election. 858 F.2d 1564. The Eleventh Circuit went on to find the local lodge was contractually obligated to go on making per capita tax payments to the IBB until there were less than ten (10) members. 858 F.2d at 1568,

citing with favor, *International Brotherhood of Boilermakers v. Local Lodge D296,* 687 F.Supp. 469 (D. Ariz. 1988).

In *International Brotherhood of Boilermakers v. Local Lodge D238,* 678 F.Supp. 1575 (M.D. Ga. 1988), *aff'd,* 865 F.2d 1228 (11th Cir. 1989), the Eleventh Circuit more squarely addressed one of the questions left unresolved by the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714, supra* whether or not a disaffiliation vote will result in the local lodge having less than ten (10) members, Citing, *International Brotherhood of Boilermakers v. Local Lodge 714,* with apparent favor, the Eleventh Circuit found that the locals in question had not disbanded by taking an internal disaffiliation vote, and that there were in fact more than ten (10) members. There, the Court found:

> The International Union presented evidence that the Local Lodges did not disband, and the Local Lodges failed to provide any evidence or testimony that their memberships fell below ten members.

865 F.2d 1235.

The Third circuit in the case *sub judice* squarely addressed one of the other questions unresolved in *International Brotherhood of Boilermakers v. Local Lodge 714* – whether or not the IBB constitution prohibits disaffiliation. Based on a complete record, the Third Circuit was able to determine that the IBB constitution did in fact prohibit disaffiliation. 866 F.2d 641, 644, n. 8. The Court went on to conclude:

> [t]he Boilermakers, even after the Locals' internal disaffiliation votes, remained the bargaining agent for the Local until the National Labor Relations Board decertification. 866 F.2d at 647.

Although the Seventh Circuit found the Boilermakers' constitution "ambiguous" on the question of disaffiliation, resolution of that issue was not necessary to the court's determination. The District Court in *International Brotherhood of Boilermakers v. Local Lodge D354,* C.No. EV-87-129-C (S.D. Ill., June 6, 1989), however observed that "a careful reading of the *Local 714* opinion leads this Court to the belief that the Seventh Circuit simply was not considering the complexities of this argument at that time" (Slip Op. at p. 7). The District Court then concluded that the decision of the Third Circuit on this issue was correct. In fact, Article XXVIII, Section 2(a) of the constitution provides that a member, in the exercise of his rights under the constitution, may not ". . . evade or avoid his responsibility to the Organization as an institution, or engage in or advocate conduct that would interfere in the organization's performance of its legal or contractual obligations or functions." Article XVII of the Constitution, makes encouraging or engaging in a secessionist movement a chargeable offense. Other chargeable offenses make clear that the duties and loyalty that members owe to this labor union preclude their disaffiliation and transfer of assets to a rival union. Revocation of a local lodge's charter is a potential penalty for this proscribed conduct. Article XVII, Section 5.

Each of the Circuit Court decisions harmonize the Boilermakers' interpretation of its Constitution; none conflict.

II. Certiorari Should Not Be Granted Because The Decision Below Is Based Upon The Distinctive Contractual Arrangement Between The Parties.

The question presented to the Third Circuit was very simple – whether or not the constitution of the IBB is consistent with the merger agreement and requires surrender of Local Lodge assets to the IBB. The Third

Circuit found as a matter of law the contract language in question was not ambiguous. The Third Circuit went on to find that the contract language unambiguously required surrender of Local Lodge assets to the IBB. Such a factual based determination, particular to the parties, does not warrant review on a petition for certiorari. *Goodman v. Lukens Steel Company,* 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

Petitioners apparently seek review on a number of more esoteric grounds, raised for the first time in their Petition for Writ of Certiorari. It would not be appropriate to grant certiorari on these issues not raised at the district court or circuit court level. *Springfield v. Kibbe,* 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987); *Mishkin v. New York,* 383 U.S. 502, 86 S. Ct. 958, 16 L.Ed.2d 56 (1966). Nor are the record facts such as to warrant review of the issues now argued by Petitioners in their Petition for Writ of Certiorari. *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L.Ed.2d 1178 (1967).

Petitioners raise for the first time in their Petition for Writ of Certiorari that the Third Circuit's decision somehow interferes with the power of employes to select their own collective bargaining representative. In fact, in each case the members of the Local Lodges petitioned the NLRB to select a new bargaining representative. The NLRB, following the requested election, certified the IWNA as these employees' collective bargaining representative. The Petitioners suggest that (1) enforcement of the IBB surrender clause and (2) the obligation to turn over to the IBB dues collected by the local lodge from members prior to the decertification of the boilermakers "creates an improper restraint on members who choose to change affiliation and thus conflicts with the fundamental federal labor policy of consensual unionism." There is absolutely no record evidence before the court below to support such an argument. Moreover, Petitioners did not argue before the court below that

enforcing the IBB constitution would somehow interfere with federal labor policy embodied in 29 U.S.C. §157.

Petitioners raise for the first time in their Petition for Writ of Certiorari the argument that the Labor Management Reporting Disclosure Act does not permit a finding of entitlement to assets. Petitioners did not raise any argument before the court below that enforcement of the IBB constitution would somehow interfere with federal labor policy embodied in 29 U.S.C. §401 or 29 U.S.C. §501.

III. Certiorari Should Not Be Granted Because The Decision Below Comports With Federal Policy.

The IBB constitution unambiguously requires Local Lodges to surrender all books, properties, records, funds and assets to the IBB, *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687; *International Brotherhood of Boilermakers v. Local Lodge D238,* 865 F.2d 1228; *International Brotherhood of Boilermakers v. Local Lodge D461,* 663 F. Supp. 1031 (M.D. Ga. 1987), *aff'd,* 835 F.2d 1439 (11th Cir. 1987); *International Brotherhood of Boilermakers v. Local Lodge D474,* 673 F. Supp. 199 (W.D. Tex. 1987); *International Brotherhood of Boilermakers v. Local Lodge D296,* 687 F. Supp. 469; *International Brotherhood of Boilermakers v. Local Lodge D405,* 699 F. Supp. 749; and *International Brotherhood of Boilermakers v. Godfrey,* CV 87-6-2010-S (N.D. Ala., May 17, 1989). The Third Circuit specifically concluded that this unambiguous language required the instant Local Lodges to surrender all books, properties, funds and assets to the IBB. *International Brotherhood of Boilermakers v. Local Lodge D504,* 866 F.2d 641.

A. Federal Labor Policy Favors Enforcement Of The IBB Constitution.

The surrender language set forth in the IBB Constitution is not unusual, and is in fact, standard language for international unions.[2] The Local Lodges herein contracted with the IBB when it became a chartered local of the Boilermakers. The constitution of the IBB sets forth the terms of that contractual relationship, by which these Local Lodges agreed to abide. One of the terms of that contractual relation was that a Local Lodge is required to surrender all books, property, funds and assets to the IBB if it discontinues that contractual relation. These Local Lodges enjoyed the benefits of that bargain for over two (2) years and then refused to meet their obligations when they wished to end the contractual relation.

There is a specific grant of federal court jurisdiction for unions to enforce such contractual relations. 29 U.S.C. §185; *Plumbers and Pipefitters v. Local 334,* 452 U.S. 615, 101 S. Ct. 2546, 69 L.Ed.2d 280 (1981). Moreover, Congress has specifically recognized the right of labor organizations to govern their own internal affairs, unless there is a direct conflict with federal labor policy. *Plumbers v. Local 334,* 452 U.S. 625-26. Concomitantly, a union's interpretation of the requirements

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2. See, e.g. *BRAC v. Orr,* 95 L.R.R.M. (BNA) 2701 (E.D. Tenn. 1977); *Local 1 v. International Brotherhood of Teamsters,* 461 F. Supp. 961 (E.D. Pa. 1978), *aff'd in part,* 614 F.2d 846 (3d Cir. 1980); *Michigan Teamsters Joint Council v. Bufalino,* 626 F. Supp. 51, (E.D. Mich. 1985); *International Brotherhood of Teamsters v. United States,* 275 F.2d 610 (4th Cir. 1960), *cert. denied,* 362 U.S. 975; *Grain Millers Local v. Grain Millers International,* 59 L.R.R.M. (BNA) 3025 (Neb. D.C. 1965); *International Union v. Local 450,* 271 Minn. 181, 135 N.W.2d 697, 59 L.R.R.M. (BNA) 228 (Minn. 1965); *Pizer v. Brown,* 133 Cal. App.2d 367, 283 P.2d 1055, 36 L.R.R.M. (BNA) 2341 (Cal. Dist. Ct. App. 1955), *cert. denied* 351 U.S. 982; *Fisher v. Behr,* 30 L.R.R.M. (BNA) 2116 (N.Y. Sup. Ct. 1952).

of its own constitution will be respected by the Court and not overturned unless patently unreasonable. *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233, 242-43, 91 S. Ct. 609, 28 L.Ed.2d 10 (1971).

The record evidence is that the IBB has interpreted its constitution to require a local lodge that is disbanded, to surrender all books, property, funds and assets to the IBB. That interpretation of the IBB constitution has been consistently applied since the incorporation of these provisions into the IBB constitution and has continued since the merger between the Cement Union and the IBB.[3] That interpretation of the IBB constitution is not patently unreasonable and, accordingly, is due proper deference by the Court.

Federal labor policy considerations favor enforcement of such a provision.[4] The most fundamental of

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3. *International Brotherhood of Boilermakers v. Local Lodge D504,* 866 F.2d 641, n. 7

4. Contrary to Petitioners' assertion, the vast majority of the courts that have addressed this issue have found similar provisions to serve valid purposes consistent with federal labor policy, and to be thus, enforceable. See generally, *Harker v. McKissock,* 7 N.J. 323, 81 A.2d 480, 28 L.R.R.M. (BNA) 2204 (N.J. 1951); *Walter Kidde v. United Electrical Radio & Machine Workers,* 7 N.J. 528, 82 A.2d 184, 28 L.R.R.M. (BNA) 2241 (N.J. 1951); *Bowman v. Moe,* 66 Wash. 2d 629, 404 P.2d 437, 60 L.R.R.M. (BNA) 2672 (N.Y. Sup. Ct. 1960); *NEA v. Dade County Class Room Teachers Association,* 407 F.Supp. 739 (S.D. Fla. 1974); *aff'd,* 527 F.2d 1388 (5th Cir. 1976); *cert. denied,* 429 U.S. 827; *McVicker v. International Union of District 50,* 327 F.Supp. 296 (N.D. Ohio 1971); *Sawyers v. Grand Lodge, International Association of Machinists,* 279 F.Supp. 747 (E.D. Mo. 1967).

Some Courts have, nevertheless, created a limited exception to this rule where labor organizations have been substantially infiltrated by organized crime or communist influences, resulting in a schism in the International union. See, e.g. *Bradley v. O'Hare,* 202 N.Y. S.2d 141. However, the National Labor Relations Board itself has already ruled no such disruption exists in the International Brotherhood of Boilermakers. See, *Georgia Kaolin, Inc.* 287 N.L.R.B. No. 50 (1987), *cited with favor, International Brother-*

Congressional labor goals is the preservation of industrial stability. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed.2d 972 (1957); *United Steelworkers v. Warrior & Gulf Navigation Company* 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960). Industrial stability is promoted through collective bargaining between employers and unions, which is in turn part of the federal labor policy. 29 U.S.C. §151; *McVicker v. International Union of District 50 Allied and Technical Workers,* 327 F.Supp. 296. The destruction of labor unions impairs the collective bargaining process and should be avoided if possible. *Electrical Workers v. Foust,* 442 U.S. 42, 99 S. Ct. 2121, 60 L.Ed.2d 698 (1979); *Vaca v. Sipes,* 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967).

If local labor unions are allowed to take the benefits of affiliation with international unions, without being bound by the international constitution, international unions will be unable to protect the limited funds that they can accumulate. International unions could spend large amounts of money organizing and representing employees at a particular location, in the expectation that those employees will become valuable members of the international union as a whole. Allowing local unions to withdraw after they receive these services, despite their contractual obligations, defeats the very purpose of an international labor union – collective action to increase economic power. Enforcement of a constitutional provision that requires the local to surrender its assets upon disaffiliation encourages participation by the local union in the international union. Healthy and stable international unions in turn promote the national labor policy of collective bargaining and industrial stability.

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hood of Boilermakers v. Local Lodge D238, 681 F.Supp. 1570 (M.D. Ga. 1988), *aff'd* 865 F.2d 1228 (11th Cir. 1989).

The Eleventh Circuit recognized that this policy consideration favored enforcement of the IBB constitution. *International Brotherhood of Boilermakers v. Local Lodge D238,* 856 F.2d 1237. As the Seventh Circuit stated:

> [a]n organization might conceivably lack minimum stability if each of its cells were free to depart at a drop of a hat, and if so, it would not comport with the procompetitive policies of Landrum-Griffin to forbid unions to take any measures at all to impede secession.

845 F.2d at 694.

Congress has also found that the preservation of ethical standards in the administration of labor organization is an important federal labor policy. 29 U.S.C. §501(a), which states, *inter alia*:

> It is, therefore, the duty of each person, taking into account the special problems and functions of a labor organization, to hold its money and property *solely for the benefit of the organization* and its members and to manage, invest, and expend the same *in accordance with its constitution and bylaws* and any resolutions of the governing bodies adopted thereunder, *to refrain from dealing with such organization as an adverse party or in behalf of an adverse party*. . . .

(Emphasis added).

The IBB constitution echoes these principles and creates an enforceable contractual obligation very similar to these statutory obligations. Thus, the IBB constitution provides that the funds of a subordinate body are to be used only for the subordinate body in accordance with the IBB constitution and if subordinate body leaves the IBB, the funds must be surrendered to the IBB. IBB constitution Article XXXVI, Section 1 and 2. Likewise,

that IBB constitution provides that no member in exercising his or her rights as a member shall evade or avoid his or her responsibilities to the organization as an institution or advocate any conduct that would interfere with the organization (IBB constitution Article XXIV Section 2), and prohibits a member from advocating conduct detrimental to the interest of the IBB or its subordinate bodies, (IBB constitution Article XVII, Section I(e) and (1). In 29 U.S.C. §411(a)(2) Congress provided:

> That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution. . . .

Contrary to the Petitioners' position, not only do the officers of Local Lodges have duties toward the membership, but they have duties toward the Local Lodge and IBB as entities.[5] These officers must hold the property of the IBB for the benefit of the IBB as an entity. Congress specifically left the manner in which this was to be carried out to the internal operation of unions and their governing rules. Congress also specifically admonished union officers not to deal with the union entity as an adverse party.

As Petitioners note, the IBB constitution provides that local lodge funds are "trust funds for the benefit of its members." Yet, the Petitioners fail to note that the IBB constitution also provides "[t]he funds of any subordinate body shall be used only for the purpose of said body" and "shall not be divided in any manner among

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5. Petitioners boldly state that there is no evidence of a violation of 29 U.S.C. §501. There was ample evidence before the Third Circuit that Local Lodge funds were dissipated in violation of the IBB constitution. Moreover, there was no evidence before the Third Circuit that the Local Lodge Membership somehow approved of this fraud.

the members of the subordinate body." IBB constitution Article XXXVI, Section 1 and 2. Compare the former Cement Union Constitution at page 3, *supra.* The IBB constitution goes on to state that those assets revert to the IBB when the local lodge is no longer a subordinate body of the IBB.

Petitioners appear to advocate that local union officers can spend local union money in any fashion they please, despite contractual restrictions, as long as a majority of the membership votes in favor of the expenditures. In this instance, those members ostensibly voted to spend money in direct contravention to the rules they agreed upon and in conflict with the union entity itself. The logical extreme of this argument is that the local union officers could use local union money to finance a vacation to Bermuda as long as a majority of the membership voted in favor of the expenditure. This is the very type of abuse that 29 U.S.C. §501 was designed to prohibit. The IBB seeks to prevent such abuses in this case by enforcing its contractual rights. By enforcing these contractual rights the court would in turn be promoting federal labor policy as set forth in 29 U.S.C. §501. *International Brotherhood of Boilermakers v. Local Lodge D296,* 687 F.Supp. 469; and *International Brotherhood of Boilermakers v. Local Lodge D111,* 681 F.Supp. at 1575, *aff'd,* 858 F.2d 1559.

B. Enforcement Of The IBB Constitution Does Not Interfere With Employee Rights To Select Their Own Collective Bargaining Representative.

This Court has previously found that the relationship between a union and its members is contractual in nature, unless the contract impinges on some policy of federal labor law. *Scofield v. NLRB,* 394 U.S. 423, 89 S. Ct. 1154, 22 L.Ed.2d 385 (1969); *NLRB v. Boeing Company,* 412 U.S. 67, 93 S. Ct. 1952. 36 L.Ed.2d 752 (1973). Thus, unions remain free to promulgate and

enforce rules against members who voluntarily submit themselves to such enforcement by agreeing to assume full membership, even if the rule and its enforcement might otherwise restrain or coerce the exercise of rights under 29 U.S.C. §157, *Pattern Makers' League v. NLRB,* 473 U.S. 95, 105 St. Ct. 3064, 87 L.Ed.2d 68 (1985); *NLRB v. Allis-Chalmers,* 388 U.S. 175, 87 S. Ct. 2001, 18 L.Ed.2d 1123 (1967).

It is correct that a union member must be free to resign his membership in the union, thereby, escaping any further application of the rule to subsequent conduct. *Pattern Makers' League v. NLRB,* 473 U.S. 95. Nevertheless, *Pattern Makers' League* does not stand for the proposition that a union member who resigns may lay claim to all or a portion of the union treasury. To the contrary, it does not impinge on federal labor law to require a member to pay all contractual financial obligation upon resignation. *NLRB v. Granite State Joint Board,* 409 U.S. 213, 93 S. Ct. 385, 34 L.Ed.2d 422 (1972). Thus, the Court stated in *Granite State Joint Board:*

> We have, therefore, only to apply the law which normally is reflected in our free institutions – right of the individual to join or resign from associations, as he sees fit subject of course to any financial obligations due and owing the group with which he was associated.

409 U.S. at 216.

The IBB has placed no restriction whatsoever on the right of the members of a Local Lodge to resign from union membership. The members of these Local Lodges were free to resign at any time they chose. There is no evidence present in this case to indicate that any members of these Local Lodges resigned from union membership prior to the NLRB election.

The IBB constitution does indicate if enough members resign, so that the local lodge falls below ten (10)

members, that the local lodge forfeits its charter in the IBB. The IBB constitution also states that if the local lodge loses its IBB charter for this or any other reason, that local lodge assets are surrendered to the IBB.

Congress has placed no restriction on an international union's ability to grant or revoke a local union charter. In fact, this Court has specifically recognized the right of international unions to govern their own internal affairs, unless there is a direct conflict with federal law. *NLRB v. Boeing,* 412 U.S. 67, and *Plumbers v. Local 334,* 452 U.S. 615, n. 15.

While there is a specific right for union members to resign from a union, there is no such statutory right for local unions to resign or "disaffiliate" from international unions. In fact, this Court has previously made it very clear that no federal statute regulates union decision making over matters such as affiliation. *NLRB v. Financial Institution Employees, Local 1182,* 475 U.S. 192, 106 S. Ct. 1007, 89 L.Ed.2d 151 (1986); *United Steelworkers v. Sadlowski,* 457 U.S. 102, S. Ct. 2339, 72 L.Ed.2d 707 (1982).

To the extent those internal union affairs are governed by contractual relations, Congress granted jurisdiction to federal courts, under 29 U.S.C. §185, to resolve differences concerning those contractual relations. Since there is no federal labor policy that is affected by a rule preventing local union affiliation, the courts have generally found such a rule contractually enforceable. *NEA v. Dade County ClassRoom Teachers Association,* 407 F.Supp. 739; *McVicker v. International Union of District 50* 327 F.Supp. 296; *Sawyers v. Grand Lodge International Association of Machinists,* 279 F.Supp. 747; *International Brotherhood of Boilermakers v. Local Lodge D474,* 673 F.Supp. 199; *International Brotherhoood of Boilermakers v. Local Lodge D238,* 865 F.2d 1228.

Enforcement of the IBB constitution does not interfere with free employee selection of their collective

bargaining representative, indeed it actually promotes such free choice. The IWNA apparently pilfered the funds of Boilermakers Local Lodges months before the NLRB election. Petitioners assert without resort to record evidence that this was done as the result of some sort of internal union disaffiliation vote.

This internal vote was ineffective to accomplish the purposes of the Petitioners both because it was in derogation of the IBB constitution itself and because these votes were kept secret from the IBB. There was also no evidence that there was any notice to the IBB of the purported vote.[6] There was no evidence that the purported vote authorized the misuse of Local Lodge funds. There was also no evidence before the court below that the members were offered an opportunity to freely discuss the issues and vote in a non-coercive atmosphere. In short, there was no evidence that the minimal due process requirements were observed.

If any party interfered with the election of the collective bargaining representative it was the IWNA. By the time of the NLRB election, the employees were faced with *fait accompli*. The employees had two (2) choices during the NLRB election; (1) vote for the IBB Local Lodge, whose treasury had been pilfered; or (2) vote for the IWNA, which was in possession of the pilfered funds. The pilferage of the IBB books, records, property and funds can only be viewed as an interference with employee freedom of choice. *Kearney & Trecker v. NLRB*, 210 F.2d 852 (7th Cir. 1954), *cert. denied*, 348 U.S. 824.

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6. Although the IBB was generally aware that the IWNA was raiding its locals, the IBB did not become aware of the purported vote at these Local Lodges until discovery took place in the underlying law suit.

C. The IBB Constitution Does Not Require Members To Continue Paying Per Capita Tax After Resignation.

The IBB constitution places no restriction on the right to resign from membership in any Local Lodge. Nor does the IBB's constitution require former members to continuing paying dues after resignation.

The IBB constitution does require a Local Lodge to continue making per capita tax/division fund payments to the IBB, for each member that it does have. The Third Circuit found that the Local Lodges attempt to dissafiliate was ineffectual. See, also, *International Brotherhood of Boilermakers v. Local Lodge D238*, 865 F.2d 1418; *International Brotherhood of Boilermakers v. Local Lodge D354*, C.No. EV-87-129-C (S.D. Ill., June 6, 1989). The Third Circuit went on to find, as did the District Court, that these local lodges collected dues from their members and continued to accept services from IBB international representatives. Thus, the Third Circuit found that the contractual obligation to make per capita tax/division fund payments continued to inure until disbandment.

The amount of per capita taxes collected was stipulated by the parties. Thus, there was no issue before the Third Circuit of requiring individuals who had resigned to pay dues.

The Third Circuit held:

> that the per capita tax is due from Local Lodges for each member until the date of decertification provided the member remained employed and *remained a member of the Local Lodge*. 866 F.2d at 647.

(Emphasis added).

Accordingly, these Local Lodges continued to have a contractual obligation to make per capita tax/division fund payments to the IBB, for each member, until

disbandment. Since a vote to disaffiliate does not constitute resignation, Local Lodges remained obligated to make payments to the IBB until disbandment.

CONCLUSION

For all foregoing reasons, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

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